

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLENDACONDON

Claimant

VS.

BOEING MILITARY AIRPLANES

Respondent

AND

AETNA CASUALTY & SURETY COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 181,407

ORDER

THE Appeals Board heard oral argument on October 6, 1994, in claimant's request to review the Award of Administrative Law Judge Shannon S. Krysl dated July 14, 1994.

APPEARANCES

The claimant appeared by her attorney, Vincent L. Bogart of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are those set forth in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge decided the claimant's last day of work and date of injury was July 6, 1993, and therefore, applied K.S.A. 44-510d as amended by the 1993 Legislature. As a result, the Administrative Law Judge treated claimant's shoulder injury as a scheduled injury. The claimant requests the Appeals Board to review the Award. The issues now before the Board are as follows:

- (1) What is the date of accident?
- (2) What is the nature and extent of disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds, as follows:

For the reasons expressed below, claimant is entitled to permanent partial disability benefits based upon a twenty-nine percent (29%) work disability arising out of a work related accident occurring on June 15, 1993.

(1) Date of accident is to be determined by reviewing the entire evidence surrounding the injury. The evidence is uncontroverted that claimant's left wrist, left arm and left elbow began to hurt in January 1993, when her job duties were changed, requiring more computer keyboard work. Her symptoms worsened and claimant reported them to Boeing Central Medical in May 1993. Claimant's symptoms further progressed and in June of 1993, claimant began to experience pain in her left shoulder and neck. Boeing Central Medical referred claimant for treatment to Paul D. Lesko, M.D., a board certified orthopedic surgeon in Wichita, Kansas. Dr. Lesko first saw claimant on June 7, 1993, and placed restrictions on her at that time to limit her keyboard work. The medical restrictions were intended to prevent additional injury.

With Dr. Lesko's restrictions in hand, claimant continued to work until she was laid off on July 6, 1993. Before seeing Dr. Lesko, claimant had requested an ergonomics analysis of her work station. The analysis determined that the claimant's work station was of inadequate height and that she needed a wrist pad to help prevent injury. Claimant obtained a wrist pad from a friend and began using it.

Date of accident defines both the rights and obligations of the parties and the date benefits become payable. The 1993 Legislature modified K.S.A. 44-510d to bring shoulder injuries within the provisions of the scheduled injuries statute. The effective date of this change was July 1, 1993. Shoulder injuries occurring before July 1, 1993, are not covered by the schedule in K.S.A. 44-510d, and, therefore, are considered to be injuries to the body as a whole and governed by K.S.A. 44-510e. Although it is relatively simple to determine a date of accident when a worker suffers a single, traumatic event, the task becomes much more difficult when the injury is caused by repetitive activity or overuse as alleged in this case.

The Appeals Board finds claimant experienced accidental injury arising out of and in the course of her employment before July 1, 1993, as a result of the repetitive activities of her job. The Appeals Board bases this finding on numerous factors found in this case such as the relatively short period of time claimant worked after July 1, 1993; until she was

laid-off; the fact claimant received Dr. Lesko's restrictions before July 1, 1993, and worked with the wrist pad she had obtained, both the restrictions and wrist pad were designed to prevent additional injury; and any injury occurring after July 1, 1993, would have been insignificant and would not have changed claimant's permanent limitations or abilities to any measurable degree. For computation purposes, the Appeals Board designates June 15, 1993, as the date of accident as it is the date claimant told Dr. Lesko about her shoulder condition.

(2) Because the accident is found to have occurred prior to July 1, 1993, claimant is entitled to permanent partial disability benefits as provided by K.S.A. 1992 Supp. 44-510e, which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

Claimant presented the testimony of Ernest R. Schlachter, M.D., who examined and evaluated her on January 10, 1994. Dr. Schlachter believes claimant has overuse syndrome of the cervical spine, left shoulder girdle, and left upper extremity with aggravation of degenerative changes in the cervical spine, tendinitis in the left shoulder, epicondylitis of the left elbow, entrapment neuropathy of the left elbow and wrist, and early carpal tunnel syndrome on the left. Dr. Schlachter believes claimant has a five percent (5%) permanent impairment of function to her cervical spine, a five percent (5%) permanent impairment of function to her left shoulder, and a ten percent (10%) permanent impairment of function to the left upper extremity, or a whole body impairment rating of fifteen percent (15%). The claimant told Dr. Schlachter she could not cook because she could not lift skillets or pans, or lift a gallon of milk, or coffee cup without debilitating pain. She also told the doctor she experienced significant pain when lifting object weighing ten to eleven (10-11) pounds. Based upon claimant's statements and his examination, Dr. Schlachter testified that claimant should avoid repetitive pushing, pulling, twisting, or grasping with the left arm; avoid using vibratory tools with the left hand; avoid semi cold environments; avoid repetitive pushing and pulling with the left shoulder; avoid over-head work with the left arm and work requiring claimant to look overhead; and avoid work requiring a keyboard and data entry.

The respondent took the deposition of Paul D. Lesko, M.D., who treated claimant between June 7, 1993 and December 14, 1993. Although it is unclear whether Dr. Lesko believes claimant has thoracic outlet syndrome, it is clear Dr. Lesko believes claimant has tendinitis in her left arm and has injured her left shoulder by overuse. Dr. Lesko testified that claimant should not lift more than fifteen to twenty (15-20) pounds with her left upper extremity on an occasional basis and ten to fifteen (10-15) pounds on a frequent basis. Dr. Lesko does not recommend surgery, but recommends that claimant continue her home exercises, physical therapy, wear her splints when working, and limit her repetitive activity to three hours per shift. He believes that claimant has a ten to twelve percent (10-12%) permanent impairment of function to the left upper extremity, including the shoulder joint. As part of his treatment, Dr. Lesko referred claimant to Paul S. Stein, M.D., a board-certified neurosurgeon, to evaluate claimant's neck. Dr. Stein testified that he saw

claimant on October 5, 1993. Although Dr. Stein found cervical disc disease, he does not believe it is symptomatic or related to claimant's symptoms. Dr. Stein did not orthopedically evaluate claimant's shoulder, nor evaluate her for thoracic outlet because he did not see clinical signs of the syndrome. Dr. Stein believes claimant has an overuse syndrome and should avoid highly repetitive activities with the left hand. He defers to Dr. Lesko for an opinion of impairment to the left upper extremity and shoulder.

Although the Appeals Board believes Dr. Schlachter conducted a thorough examination, the Board is unable to give his testimony much weight due to the somewhat inaccurate description of complaints claimant provided to him. Claimant, who is left handed, told Dr. Schlachter, and the Administrative Law Judge at regular hearing, her pain was so severe that she could not lift pans and skillets to cook and experienced significant pain lifting a coffee cup or a gallon of milk with her dominant hand. However, the respondent introduced evidence that claimant participated in a bowling league from August 1993 through April 7, 1994. Claimant bowled thirty-three (33) weeks of the thirty-five (35) week bowling league. For league play, claimant bowled three (3) games a night, one (1) night per week, for a total of ninety nine (99) games. Claimant used an eleven (11) pound bowling ball and, rolled it approximately sixty (60) times per night. Based upon this information, we feel Dr. Schlachter's opinions and restrictions are both without proper basis and would be modified in light of this information.

Because the opinions of Dr. Schlachter were relied upon exclusively by claimant's expert labor market witness, little weight can be given to the testimony of Jerry Hardin. Therefore, the Appeals Board is left with the opinions of respondent's labor market expert, Karen Terrill, to evaluate loss of labor market access. Ms. Terrill testified claimant has lost forty-six percent (46%) of her ability to perform work in the open labor market utilizing the restrictions of Dr. Lesko, and three percent (3%) of the open labor market utilizing the restrictions of Dr. Stein. Because the Appeals Board believes claimant's actual loss of labor market lies somewhere between the three percent (3%) and forty-six percent (46%) estimates provided by Ms. Terrill, the approximate mean of the percentages, twenty-four percent (24%), is claimant's loss of labor market access in this case.

Claimant has lost thirty four percent (34%) of her ability to earn a comparable wage in the open labor market. The parties stipulated claimant's average weekly wage at the time of the accident was \$522.59, including additional compensation items. Claimant began work at Wichita State University earning \$14,328 per year and after six months will earn \$14,688. In addition to her wage, claimant receives from the University additional compensation items such as paid health insurance and disability insurance. The Appeals Board adopts the opinion of claimant's labor market expert, Jerry D. Hardin, that claimant has lost approximately thirty four percent (34%) of her ability to earn a comparable wage when comparing the actual pre-injury and post-injury wages, both of which include additional compensation items.

Both claimant's loss of ability to access the open labor market and loss of ability to earn a comparable wage must be considered to determine permanent partial general disability. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). No specific formula is required. However, no compelling reason exists to give either factor greater weight than the other. Averaging both factors yields a work disability of twenty-nine percent (29%) which we find is claimant's work disability for which she is entitled permanent partial general disability benefits.

(3) The Appeals Board adopts the findings and conclusions of the Administrative Law Judge as set forth in the Award that are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated July 14, 1994, is modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Glenda Condon, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for an accidental injury occurring on June 15, 1993, and based on an average weekly wage of \$522.59.

The claimant is entitled to 415 weeks of permanent partial disability compensation at the rate of \$101.04, making a total award of \$41,931.60.

As of November 23, 1994, there is due and owing to the claimant 75.29 weeks of permanent partial disability compensation at the rate of \$101.04 per week for a total of \$7,607.30 due and owing in one lump sum less any amounts previously paid. The remaining balance of \$34,324.30 is to be paid at the rate of \$101.04 per week for 339.71 weeks until fully paid or further Order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed 80% against the Respondent and 20% against the Workers Compensation Fund to be paid direct as follows:

Kelley, York & Associates, Ltd.	
Deposition of Ernest R. Schlachter	\$168.00
Deposition of Jerry D. Hardin	394.35
Barber & Associates	
Transcript of regular hearing	\$204.25
Deposition Services	
Deposition of Paul D. Lesko, M.D.	\$248.20

Deposition of Karen Crist Terrill	167.60
Deposition of Paul S. Stein, M.D.	110.20
Deposition of Glenda Condon	412.00

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vincent L. Bogart, Attorney at Law, Wichita, KS
Vaughn Burkholder, Attorney at Law, Wichita, KS
John Nodgaard, Attorney at Law, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director